STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

GAY ALLIANCE OF GENESEE VALLEY, INC.,

Plaintiff,

v.

CITY ASSESSOR,
CITY OF ROCHESTER, NEW YORK,

Defendant.

DEFENDANT'S MEMORANDUM OF LAW

Index No. 8872/91

The Gay Alliance of the Genesee Valley, Inc. (GAGV) applied to the City Assessor in 1991 for a tax exemption on its property at 179-183 Atlantic Avenue, pursuant to section 420-a of the Real Property Tax Law. The Assessor denied the exemption. The GAGV then appealed to the City's Board of Assessment Review to reverse the Assessor's determination and grant the exemption. The Board denied the request. The GAGV then brought this lawsuit challenging the denial of its application for a tax exemption. The GAGV has now moved for summary judgment.

At the outset, it may be helpful to note the points that are not in dispute, as well as those that are. In its answer, the City stated as a defense that the GAGV had initially asked for an exemption only in the category "educational" and so was limited to asserting that ground in this lawsuit. At this point, the City is willing to withdraw that defense, in the interest of reaching the full merits of the case as expeditiously as possible. In its motion papers, the GAGV asks for exemption either as an

"educational" organization, a "charitable" organization, or a "moral or mental improvement" organization. The City will respond to all three claims, and considers all three claims to be properly before this court.

In its motion papers, the GAGV states that it received a confusing notice from the Board of Assessment Review after its hearing (Yacknin Affirmation, pp. 12-14; see also Jacobs Affidavit, par. 7). That point does not appear, however, to be material to this motion. Whether or not there was initial confusion, the GAGV ultimately understood, and certainly understands now, that the Board denied its request for an exemption. Any delay in taking further steps on the part of the GAGV due to its initial confusion has not been raised by the City as a defense or bar to this action. The GAGV has not asserted any respect in which the alleged confusion affects the issues of this case.

The City does not dispute that the GAGV is the owner of the subject parcel of property at 179-183 Atlantic Avenue; that the property is used in furtherance of the GAGV's corporate purposes; that the GAGV is a bona-fide not-for-profit organization which performs a worthwhile community service; that there is no hidden commercial motive behind the GAGV's activities and no hidden profiteering by any involved individuals.

The principal question at issue in this case is whether the GAGV falls into any of the following three categories of not-for-profit organizations entitled to tax exemption under section 420-a of the Real Property Tax Law: (1) educational, (2) charitable, or (3) moral or mental improvement of men, women or children. A secondary question raised by the GAGV is whether the

City Assessor's act of denying the tax exemption has deprived the GAGV of its federal constitutional rights to equal protection of the laws, free speech, and freedom of association, and whether the GAGV is entitled to recover its attorneys' fees under 42 U.S.C.A. 1983 and 1988.

1. Real Property Tax Law Section 420-a

a. Educational

In its initial application for tax exemption, the GAGV stated that its primary purpose was "the eradication of homophobia through educational means", and it sought an exemption as an "educational" organization (Petition Exhibit D).

The courts of this state have reserved the category of "educational" in RPTL 420-a for organizations that contribute to "the expansion of knowledge by teaching, instruction or schooling" (Swedenborg Foundation v. Lewisohn, 40 N.Y.2d 87, 94 (1976)), that provide "an organized instructional program" (Asia Society, Inc. v. Tax Commission, 92 A.D.2d 781, 782 (1st Dept. 1983)), or that "offer facilities and instruction" (Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33, 36 (1983)).

While the Court of Appeals has made plain that an organization need not be chartered by the Board of Regents, nor approved by the Commissioner of Education, nor have faculty or student enrollment in order to be considered educational (Symphony Space, Inc. v. Tishelman, 60 N.Y.2d at 37), the court has never expanded the definition to such an extent as would include every instance of the dissemination of information or knowledge.

In general parlance, the term "education" can apply to a wide range of activities, from the formal education provided by a public grade school or a private university, to on-the-job vocational training programs, to efforts at "consciousness-raising" of the general public by advocates of women's or minority rights, to the missionary activities of certain religious groups, to the dissemination of information and ideas through newspapers and newsletters. However, the courts have made clear that not all of these qualify for tax exemption.

In Swedenborg Foundation v. Lewisohn, 40 N.Y.2d 87, (1976), the Court of Appeals distinguished "education" from "the very much broader process of the communication of facts and ideas", and held that only the former was entitled to tax exemption (40 N.Y.2d at 94). On the facts of that case, the court held that the Swedenborg Foundation was not entitled to a tax exemption. In its brief on this motion, the GAGV argues that the case Symphony Space, Inc. v. Tishelman, (60 N.Y.2d 33 (1983)) controls this case, and mandates the granting of an exemption for the GAGV. However, the facts of this case are much closer to the facts of Swedenborg than those of Symphony Space.

The Swedenborg Foundation was founded to promote and circulate the writings and teachings of Emanuel Swedenborg, an eighteenth-century Swedish theologian, philosopher and scientist. The court found that while the Foundation sponsored some seminars, supported research, and maintained a library, all related to Swedenborg's teachings, these activities were not sufficient to make it an educational organization under RPTL 420-a.

The Swedenborg Foundation was an organization with a mission, and that mission was to promote the teachings of Swedenborg. The Foundation did not simply make its materials available to interested learners, but actively promoted those materials. It published volumes of Swedenborg's writings, and sold them at or below cost to a wide range of institutions as well as the general public. The dissemination of the volumes was done largely through "outreach distribution", by unpaid individuals who volunteered to circulate the materials because of their interest in Swedenborg.

Likewise, the GAGV is an organization with a mission. When it speaks of "educating" the public in order to eradicate homophobia, the GAGV does not mean a neutral offering of instruction or knowledge to interested students, but rather an active promotion of its principles and ideas.

The organization Symphony Space, Inc., on the other hand, was formed to provide facilities and instruction in the fields of dance and theater. It offered stage facilities for rehearsals and performances by student groups and "struggling artists". It conducted performances and lectures at nearby schools, as well as on-site "lectures, discussions, workshops and commentary" in the fields of "lighting, staging, promotion and publicity". Students at a nearby community college earned credits working at the theater. (Symphony Space, Inc. v. Tishelman, 60 N.Y.2d at 36)

While Symphony Space, Inc., may have been an untraditional educational institution in some ways, it did fulfill the rather traditional educational function of offering instruction in a given field to interested students. Indeed, in the field of theater arts, any effective education must necessarily

go beyond the classroom and offer training and experience on and behind the stage. The educational experience offered by Symphony Space, Inc. was, like all true education, initiated by interested learners, not by proselytizing teachers.

Clearly, such "education" as is offered by the GAGV is more akin to the Swedenborg Foundation's promotion and advocacy of the teachings of Swedenborg than it is to the facilities and instruction made available to students of theater arts by Symphony Space, Inc. This is not to say that there is anything wrong with being an organization that promotes or advocates a particular point of view. Indeed, the Court of Appeals did not purport to criticize the Swedenborg Foundation for that aspect of its mission. It is just that such a mission does not itself qualify as educational.

This also is not to say that an organization whose primary activity legitimately qualifies it for a tax exemption, whether in the educational category or some other category, will lose that exemption if it also engages in advocacy activities. However, while advocacy activities will not disqualify an organization from exemption, they are not sufficient, standing alone, to entitle the organization to exemption.

b. Charitable

The GAGV also claims to qualify as a "charitable" organization under RPTL 420-a.

The term "charitable" is nowhere expressly defined in the Real Property Tax Law. However, it is clear that "charitable" requires more than simply being a not-for-profit organization, and more than simply providing a worthwhile public service. Among the many cases holding various organizations that provided beneficial and worthwhile services not to be tax-exempt are the following:

New York City Bar Association v. Lewisohn (34 N.Y.2d 143, 1974)
Swedenborg Foundation, Inc. v. Lewisohn (40 N.Y.2d 87, 1976)
Asia Society, Inc. v. Tax Commission (92 A.D.2d 781, 1st Dept. 1983)
Stuyvesant Square Thrift Shop (54 N.Y.2d 735, 1981)
Delancey Street Foundation v. Board of Assessment Review (drug rehab center) (112 A.D.2d 132, 2nd Dept. 1985)
Bedford-Stuyvesant Restoration Corp. v. Lewisohn (50 A.D.2d 815, 2nd Dept. 1975)
Mount Tremper Lutheran Camp v. Board of Assessors (70 A.D.2d 984, 3rd Dept. 1979)
American Bible Society v. Lewisohn (40 N.Y.2d 78, 1976)
Genesee Hospital v. Wagner (47 A.D.2d 37, aff'd 39 N.Y.2d 863, 1976)
Good Will Club of Amsterdam v. City of Amsterdam (31 Misc.2d 1096, Sup.Ct. Montgomery Co., 1960)
National Council of Jewish Women v. Board of Assessors (21 Misc.2d 142, Sup.Ct. Nassau Co. 1959)
Ind. Order of Odd Fellows (283 A.D. 199, 4th Dept. 1954)

Furthermore, it is clear that a determination by the Internal Revenue Service that an organization qualifies as "charitable" for its purposes is not determinative for local real property tax exemption purposes. New York City Bar Association v. Lewisohn, 34 N.Y.2d 143, 154, Swedenborg Foundation v. Lewisohn, 40 N.Y.2d 87, 95.

The question is: What constitutes a "charity", under RPTL 420-a? Few court decisions have attempted to state a clear positive definition of the term, although many have addressed the question in the negative, and have stated what is not a "charity". In two cases involving the taxable status of residential facilities, courts have stated that a residential facility for middle-income persons, not targeted to lower-income persons, could not qualify as "charitable". Valeria Home, Inc. v. Cook, 22 N.Y.2d 388 (1968), Presbyterian Residence Center Corp. v. Wagner, 66 A.D.2d 998 (4th Dept. 1978), aff'd 48 N.Y.2d 885 (1979).

A "charitable" organization generally provides a necessary commodity or service to needy persons. The beneficiaries must be a targeted group of individuals who are unable to provide the commodity or service for themselves, generally due to lack of money. An essential element of a "charity" is this flow of monetary benefits from a "benefactor" or "benefactor class" to a "beneficiary class".

It is important to distinguish between "charitable" organizations and "self-help" organizations. In a "charitable" organization, the benefactor or benefactor class provides money to pay for goods or services that are targeted to the needy beneficiary class. Sometimes the benefactor is a government, sometimes private donors. In a "self-help" organization, people band together to provide for themselves needed goods or services. A food co-op is an example of a "self-help" organization, as is a mutual support group such as Parents Without Partners. These organizations are not "charitable", in part because those receiving the goods or services are basically the same as those providing the goods or services; the beneficiary class is the same as the

benefactor class. (See the discussion of "mutual benefit societies" in Mt. Tabor Lodge No. 780, Ind. Order of Odd Fellows v. Nordstrom, 283 A.D. 199, 203 (4th Dept. 1954).)

The GAGV is basically a "self-help" organization. It is an organization primarily of gay people, to serve the special needs of gay people. It is comprised of individuals and interest groups who work in various ways, on a volunteer basis, "to promote the eradication of homophobia in the Rochester area community and to educate the general public about homosexuality and other related issues, such as AIDS." It has a "peer facilitation counseling program, a Speakers' Bureau, the publication of a monthly newspaper, the Empty Closet, a group for Gay and Lesbian youth, and Saturday night social get-togethers." (Petition Exhibit C) Thus, the GAGV's services appear to consist of both services to the gay community (personal, social and recreational) and services on behalf of the gay community (advocacy).

While the GAGV's activities and services, both those directed to members of the gay community and those on behalf of the gay community, are clearly valuable and worthwhile services, they do not meet the test of "charitable".

The GAGV has asserted in its motion papers that the City has granted tax exempt status to other similar organizations, citing the Group 14621 Community Association, the Regional Council on Aging, the 19th Ward Community Association, and the YWCA. However, as shown by the City Assessor's affidavit, submitted herewith, those organizations are all substantially different from the GAGV.

The Group 14621 Community Association and the 19th Ward Community Association both serve within their neighborhoods certain low-income populations, and receive government grants to administer programs targeted to those populations. The Regional Council on Aging also administers substantial government grant programs, targeted to segments of the needy elderly population in the Rochester area. The YWCA is exempt not as a charitable organization, but as an organization "for the moral or mental improvement of men, women, or children" (see Point c.).

For comparison, other social and recreational organizations that have been held recently by the City Assessor not to qualify as charitable organizations are: the Rochester Recreation Club for the Deaf, the Presbyterian Residence Center, the Masonic Temple, and the University Club. (See Jacobs Affidavit, par. 12.)

The GAGV has cited in its motion papers a tax exemption allegedly granted by the New York City Assessor to an organization allegedly similar to the GAGV. However, that case is irrelevant to this case. There may be special statutory provisions that apply in New York City. Furthermore, we are not privy to all the facts of the New York City organization, nor to the specific use of the property in issue. Finally, it is possible that the New York City Assessor, for whatever reasons, may choose not to comply with applicable law. That choice certainly would not be binding on the Rochester City Assessor.

Each tax exemption application must be judged on its own merits. This case should involve an evaluation of the facts pertaining to the GAGV and its

use of this property, under the language of RPTL 420-a. This case is not a proper forum for a review of other tax exemptions on this city's or other cities' assessment rolls.

c. Moral or Mental Improvement

The third category in RPTL 420-a under which the GAGV seeks tax exemption is as an organization "for the moral or mental improvement of men, women or children".

While the language of this provision is fairly broad, its legislative history makes clear that it has a considerably narrower meaning. This provision was added to state law in 1893, by chapter 498 of the Laws of 1893. The phrase was taken directly from the YMCA's charter. The statute was a clear response to the Court of Appeals' denial of tax-exempt status to the YMCA in 1889, under the law in effect then (YMCA v. Mayor of New York, 113 N.Y. 187). (See 5 Op.Counsel SBEA No. 17, p. 32 (1975), regarding the history of this provision and its applicability to a homeowners' association.)

Since that time, the application of this provision has remained rather limited. In 1978, the Appellate Division, Fourth Department, held that a not-for-profit home for the elderly did not qualify for exemption under this provision.

> Petitioner's property does not qualify for exemption pursuant to the provisions relating to the moral or mental improvement of men and women. That provision of the statute was designed to benefit organizations such as the YMCA, YWCA, Boy Scouts and Girl Scouts (see N.Y. Legis. Ann., 1972, p. 266). Presbyterian Residence Center Corp. v. Wagner, 66 A.D.2d 998, 999 (4th Dept. 1978), aff'd 48 N.Y.2d 885 (1979).

In 1985, the Appellate Division, Second Department, held that a drug and alcohol rehabilitation center, while "both admirable and laudatory", did not qualify for exemption under the "moral or mental improvement" category. Delancey Street Foundation, Inc. v. Board of Assessment Review, 112 A.D.2d 132 (2nd Dept. 1985).

While the Court of Appeals has in several cases granted tax exemptions with a citation to three different categories of RPTL 420-a, i.e., educational, charitable, and moral or mental improvement (New York Botanical Gardens v. Town of Washington, 55 N.Y.2d 328 (1982), Symphony Space, Inc. v. Tishelman, 60 N.Y.2d 33 (1983)), the court has not, to my knowledge, recently approved any exemptions based solely and explicitly on the category of "moral or mental improvement of men, women or children". Furthermore, the two cited decisions, in my opinion, should properly be treated as resting on "educational" grounds.

d. "Exclusively Organized" Requirement

It must be remembered that RPTL 420-a requires not just that an organization have an exempt purpose for some portion of its activities, but that it be organized "exclusively" for exempt purposes. "Exclusively", in this context, has been construed by the courts to mean primarily, so that an ancillary non-exempt activity will not necessarily disqualify an otherwise exempt organization from its exemption. However, the predominant activity of the organization must clearly be found to be a qualified exempt activity.

In this case, the GAGV appears to conduct two predominant types of activity. One is social or recreational, providing facilities and activities for the coming together of members of the local gay community for their mutual support and enjoyment. The other is advocacy, the effort to "raise the consciousness" of the general public and local institutions as to the problems of the gay community, and to try to solve those problems. While both those activities are laudable, they do not qualify as either "charitable", "educational", or "moral or mental improvement of men, women, or children".

The fact that the GAGV may have some characteristics that partake of a "charitable" or "educational" nature does not entitle it to an exemption. While the Court of Appeals, in the Botanical Gardens and Symphony Space cases, has indicated that the categories of exemption are not unduly rigid, and that an organization may qualify under a combination of categories, there is no evidence that those decisions were intended to dilute the test of tax exemption to the point where an organization that has some minor attributes of several of the categories can "piggyback" those attributes in a manner that qualifies it for exemption. The rule still is that the essential purpose of the organization must qualify as an exempt purpose.

The defendant City Assessor urges this court to deny the GAGV's motion for summary judgment on its complaint, and to grant his cross-motion for summary judgment, declaring that the subject property owned by the GAGV is not entitled to tax exemption under section 420-a of the Real Property Tax Law.

2. Federal Constitutional Claims Under 42 U.S.C.A. sec. 1983

a. Summary Judgment Premature

Procedurally, the GAGV cannot ask for summary judgment on a cause of action it has not yet pleaded. A party cannot simultaneously ask for permission to amend its complaint to add a new cause of action and ask for summary judgment on that cause of action. CPLR 3212(a) expressly provides that a motion for summary judgment may be made only "after issue has been joined". Clearly, issue has not been joined as to the GAGV's proposed section 1983 claims.

The only instance in which a plaintiff is permitted in essence to combine its complaint and a motion for summary judgment is where the action is upon a judgment or an instrument for the payment of money only, pursuant to CPLR 3213. In that case, the motion papers may serve in lieu of a complaint. In all other cases, a motion for summary judgment may be made only after service of both a complaint and an answer.

In this case, if the court determines that it is proper to grant GAGV its request to amend its complaint, the defendant is entitled to be served with the amended complaint and to have the normal time in which to serve his answer, before being required to defend a motion for summary judgment. The right to serve an answer is particularly important here, because the defenses available in a section 1983 action are completely different from the defenses available in an action challenging the denial of a tax exemption.

The GAGV has pointed to no reason why the normal rules of pleading and practice should not apply here. The GAGV's attorney's affidavit merely states, in a footnote on page 17, in conclusory fashion, that "this court should find that there is no need for plaintiff to serve an additional amended pleading or for defendant to answer plaintiff's amendments outside the context of plaintiff's pending Motion for Summary Judgment".

This court should deny the GAGV's motion for summary judgment on the claims that it seeks now to add to its complaint.

b. Leave to Amend Should Be Denied

While leave to amend a pleading should be freely given (CPLR 3025(b)), the courts of this state have consistently held that "it is appropriate for the court to examine the sufficiency of the pleadings on a motion to amend: '[W]hen a substantial question is raised as to the sufficiency or meritoriousness of a proposed pleading or matter contained therein . . . such question should be resolved at the threshold in order to obviate the possibility of needless time-consuming litigation.' (Sharapata v. Town of Islip, 82 A.D.2d 350, 362, aff'd 56 N.Y.2d 332; see, also, East Asiatic Co. v. Corash, 34 A.D.2d 432, 434 (1st Dept. 1970))". Anderson v. University of Rochester, 91 A.D.2d 851 (4th Dept. 1982). See also Daniels v. Empire-Orr, Inc., 151 A.D.2d 370 (1st Dept. 1989); Megaris Furs, Inc. v. Gimbel Brothers, Inc., 172 A.D.2d 209 (1st Dept. 1991).

In this case it is clear that the GAGV's proposed claims under 42 U.S.C.A. section 1983 have no merit and fail to state a cause of action.

Therefore, the GAGV's motion for leave to amend its complaint to include those claims should be denied.

Section 1983 provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, section 1983 requires that the alleged violator of a constitutional right shall have acted "under color of any statute, ordinance, regulation, custom, or usage" of the state.

In its motion papers, the GAGV alleges that the defendant City Assessor, presumably in his official capacity, "violated the GAGV's federal and state constitutional rights to free speech" (Yacknin Affirmation, p. 2, par. 4; see also p. 16, par. 75). In support of this allegation, the affirmation states:

> The evidence reveals that defendant City Assessor denied the GAGV a property tax exemption because it is an organization that is comprised of and directs its activities toward the lesbian and gay community in the Rochester area. (P. 16, par. 75)

The so-called "evidence" supporting this conclusion apparently consists only of the defendant City Assessor's previous grant of an exemption to certain other organization, namely, the Group 14621 Community Association, Inc., the Regional Council on Aging, Inc., the 19th Ward Community Association, and the YWCA (Yacknin Affirmation, pp. 6-9). Apparently, the

GAGV regards the defendant's grant of an exemption in those four cases coupled with his denial of an exemption to the GAGV as self-evident proof that his decision was based on prejudice against organizations with a gay or homosexual orientation.

First of all, that conclusion is far from self-evident. There are a number of other differences between the four groups granted tax exemption and the GAGV, difference regarded by the defendant as crucial in determining whether they were eligible for tax exemption. As noted in the defendant's affidavit, submitted herewith, the two community associations and the Regional Council on Aging all sponsored programs specifically serving segments of the low-income and/or elderly populations of the Rochester area, qualifying them as "charitable" organizations. The YWCA qualifies as an organization for the "moral or mental improvement of men, women or children". The GAGV qualifies in neither category. Therefore, the defendant's action in denying the GAGV's application for tax exemption had a clear rational basis that had nothing to do with the GAGV's gay or homosexual orientation.

Secondly, and more importantly at this stage of this case, section 1983 requires an allegation of more that an isolated instance of unconstitutional discrimination. Ir require an allegation of either an official "statute, ordinance, or regulation", or an unofficial "custom or usage", under color of which the defendant engaged in the alleged discrimination.

In its complaint and in it motion papers, the GAGV makes no such allegations.

Clearly, there is no "statute, ordinance, or regulation" of the City of Rochester that promotes discrimination against gay persons or organizations. To the contrary, the City of Rochester adopted a "Resolution Prohibiting Discrimination", Resolution No. 83-58, on December 27, 1983, expressly prohibiting discrimination on the basis of "sexual orientation", among other bases (Exhibit A to Jacobs affidavit).

And the GAGV does not allege any "custom or usage" on the part of the City Assessor of discriminating against gay persons or organizations. Without such an allegation, there is no cause of action under section 1983.

> Consistent with the commonly understood meaning of custom, proof of random acts or isolated events are insufficient to establish custom. Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987); Depew v. City of St. Mary's, 787 F.2d 1496, 1499 (11th Cir. 1986). Only if a plaintiff shows that his injury resulted from a "permanent and well-settled" practice may liability attach for injury resulting from a local government custom. Thompson v. City of Los Angeles, 885 F.2d 1439, 1443-44 (9th Cir. 1989).

The GAGV has no basis in this action for asserting any claims for federal civil rights violations under section 1983. Instead, this action is a fairly typical tax exemption case, to be decided under the language of the Real Property Tax Law. It would appear that the sole reason for the GAGV's efforts to tack on a section 1983 claim is to obtain an award of attorney's fees, clearly not obtainable in a regular tax exemption case.

Because the GAGV's proposed federal civil rights claims under section 1983 do not state a cause of action and have no merit, the GAGV's motion for leave to amend its complaint to include those claims should be denied.

Dated: November 12, 1992

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DOCUMENT: Defendant's Memorandum of Law

NOTICE OF ENTRY

The original hereof was filed in the Office of the Monroe County Clerk on_____, 19___

COPY RECEIVED:

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Attorneys for _____on _____

Attorneys for _____on _____

Attorneys for _____on _____

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